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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 96

A.T. GORDON, et al.,

Petitioners

v.

GRANVILLE LANCE, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, *AMICI CURIAE*

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INTEREST OF *AMICI**

The American Civil Liberties Union is a non-partisan nation-wide organization dedicated solely to the defense of those constitutional liberties safeguarded by the Bill of Rights. The American Civil Liberties Union of Northern

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*Letters of consent from counsel for petitioners and respondents to the filing of this brief have been filed with the Clerk of the Court.

California is affiliated with the American Civil Liberties Union and was actively involved in *Westbrook v. Mihaly*, 87 Cal. Rptr. 839 (1970); *pet. for cert. filed* 39 U.S.L.W. 3096 (9/15/70) a recent decision of the California Supreme Court on issues identical to the ones herein.

In its fifty year history, the American Civil Liberties Union has fought to secure to all citizens and groups the full measure of participation in our political process. We have done so in the belief that political rights are a fountainhead from which the protection and preservation of other cherished liberties will flow. Toward this end, we have engaged in litigation challenging efforts to deny or dilute the political voice of individuals or groups and have participated in such important cases before this Court as *Reynolds v. Sims*, 377 U.S. 533 (1964) and *Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969).

We believe that the instant case raises issues as important as any voting case this Court has decided. It involves a disarmingly simple and direct method of diluting the political power of a majority of the community. For the reasons set forth herein, *amici* submit that the decisions of this Court provide ample doctrinal authority for holding that extraordinary majority requirements in elections such as these deny the majority the equal protection of the law.

STATEMENT OF THE CASE

This case involves provisions of the West Virginia Constitution, Article X, Sections 1 and 8, and Statutes, Sections 13-1-4 and 13-1-14, which provide that, in elections held by political subdivisions of the state to decide whether to incur bond indebtedness or to levy additional taxes, such proposals shall not pass unless they receive the affirmative votes of sixty percent of the votes cast in the election. These provisions were held in violation of the United States Constitution by the highest court in West Virginia. *Lance v. Board of Education of the County of Roane*, 170 S.E. 2d 783 (1969).

In April 1968 the Roane County Board of Education, at a special election, submitted to the voters of the county the question of issuing $1.8 million worth of bonds "for the purpose of alleviating the overcrowded condition of school classrooms and facilities, removing fire hazards, providing for more adequate and more modern vocational and educational facilities, and for the purpose of meeting the needs of disadvantaged children." *Lance v. Board of Education of the County of Roane, supra* at 785. At the same special election, voters were asked to vote on the laying of additional tax levies to support current expenditures and capital improvements. Of the total votes cast, 51.55 percent favored the bond issue and 51.51 per cent favored the tax levy. Because of the sixty-percent requirement, the measures were considered defeated. The respondents herein, voters who had cast their ballots in the affirmative, demanded that the Board of Education authorize the bonds and additional taxes. The Board refused and suit was filed.

In their complaint the respondents alleged that the Roane County schools had been basically unimproved since 1946 and fell far below the state average classroom size and facilities. They further alleged that six previous similar proposals had been "defeated," although each received majorities of affirmative votes, ranging from 51.51 percent to 55.84 percent. The lower court disagreed with the plaintiffs' contention that the sixty-percent requirement denied them equal protection of the laws, but the Supreme Court of Appeals reversed, holding the constitutional and statutory arrangements in violation of the Fourteenth Amendment.

SUMMARY OF ARGUMENT

Requiring some form of mandatory referendum as a condition precedent to incurring local debt or raising local tax rates has long been a feature of American municipal history. Although requirements as to the required majority vary, the most common provision is for a simple majority. See *West-*

brook v. Mihaly, supra at 857, n. 48, *citing Note, Judicial Activism and Municipal Bonds,* 56 Va. L. Rev. 295, 331-34 (1970); *but see, Comment, Extraordinary Majority Voting Requirements,* 58 Geo. L.J. 411, 412 (1969). Demanding more than a simple majority can, as it has here, frustrate the will of the majority of the community in seeking public improvements. If the imposition of an extraordinary majority requirement were merely unsound public policy, it would not be for this Court to condemn such devices. But such arrangements directly and unambiguously dilute the vote of all those who favor a given proposal and in so doing they violate the constitutional command of equal protection of the law.

There are two related, though distinct, doctrinal frameworks in which the issues in this case can be analyzed. First, there are the numerous decisions of this Court which have invalidated arrangements or classifications that directly or indirectly denied or diluted the vote of certain citizens. In the denial cases, particularly the more recent decisions, *e.g., Cipriano v. City of Houma,* 395 U.S. 701 (1969); *Kramer v. Union Free School District No. 15, supra,* this Court has developed and applied its "compelling state interest" doctrine to invalidate the provisions there involved. In the dilution cases, the Court has spelled out its historic one man-one vote doctrine, *e.g., Reynolds v. Sims,* 377 U.S. 533. Both the denial and the dilution cases are informed by the generic notion that each citizen is presumptively entitled to an equal voice in the political process which can be infringed only upon the showing of a compelling, overriding state interest. See *Kramer v. Union Free School District No. 15, supra.* This equal voice principle provides a firm doctrinal basis for invalidating the extraordinary majority requirements here which classify voters into two categories, dilute the voting power of affirmative votes and, conversely, augment the vote of those who cast a negative ballot. This analysis was utilized by the California Supreme Court in *Westbrook v. Mihaly, supra,* to strike a state constitutional provision basically like the one at issue

here. The opinion is thorough and compelling, and *amici* commend its persuasive reasoning to this Court.

Amici will also develop a second, somewhat alternative theory to sustain the judgment below. The method by which the classification of voters into two groups denies equal protection of the law is as straight-forward as many of the devices previously condemned by this Court under the more usual analysis suggested above. But the central notion of the Equal Protection Clause is vulnerable to new or non-traditional methods of attack, deriving either from modern inventions or, as in this case, from the history of a less egalitarian age. This Court has indicated, in *Hunter v. Erickson*, 393 U.S. 385 (1969), the direction that judicial enforcement of equal protection will take to resist these novel methods of discrimination. Our second thesis, derived from *Hunter*, is that a state violates the Equal Protection Clause whenever it isolates the lawmaking interests of disfavored groups and establishes special obstacles to the realization of those interests, obstacles which are significantly more onerous than those faced by other groups. We submit that the sixty percent vote requirement imposes such a special burden and that it therefore runs afoul of the Fourteenth Amendment.

ARGUMENT

I. EQUAL PROTECTION AND VOTING - FROM DENIAL TO DILUTION.

Most of this Court's jurisprudence in the area of voting rights has been developed in cases scrutinizing state schemes which denied the franchise outright to certain citizens or groups. Such a judicial response is not surprising, for the right to vote, since it opens the door to the political process, has been the focus of much discrimination. Certain groups or classes were so historically the victims of that discrimination, such as blacks and women, that separate constitutional protection of their franchise was established (in

the Fifteenth and Nineteenth Amendments). Yet even in the controversies concerning the franchise of such historically mistreated groups the Equal Protection Clause has loomed large and it is quite clear from our present perspective that much of what was guaranteed under those later Amendments could have been, and frequently was, accomplished under the Equal Protection Clause alone.

Thus, for example, the right of blacks to vote in party primaries is firmly established as a part of the guarantee of the Fifteenth Amendment. *Terry v. Adams,* 345 U.S. 461 (1953); *Smith v. Allwright,* 321 U.S. 649 (1944). But the same right is also a part of the Equal Protection Clause. *Nixon v. Condon,* 286 U.S. 73 (1932). (opinion by Cardozo, J.)

And while the right of blacks not to be disenfranchised by racial gerrymandering is easily found in the Fifteenth Amendment, *Gomillion v. Lightfoot,* 364 U.S. 339 (1960), the same result was independently available under the Equal Protection Clause—as pointed out by Mr. Justice Whittaker, concurring in *Gomillion.* In fact, the theory that the Equal Protection Clause prevents a registrar of voters from refusing to register blacks because of their race was accepted as early as 1927 by Mr. Justice Holmes, writing for a unanimous Court in *Nixon v. Herndon,* 273 U.S. 536 (1927).

These cases are the core of the constitutional guarantee of the voting rights of traditionally disfavored groups. They all are, or could have been, equal protection cases. They are straightforward answers to the most obvious types of discrimination.

But just as there are many motives for discriminating at the polls beyond the fear or mistrust based on race or sex or religion, there are many disfavored groups, many neither historically disfavored nor permanently fixed, but carved out to suit some discriminatory goal. For these, too, the Equal Protection Clause has provided shelter. An obvious example is *Harper v. Virginia State Board of Education,* 383 U.S. 663 (1966), in which the Court struck down Virginia's poll tax as a violation of Equal Protection since it discrimi-

nated against the poor. This class is not one tied to race, sex, or religion, and the historical mistrusts they evoke. Its members are mobile; its boundaries are vague; it is a group that one may enter, or leave. The concept of Equal Protection was flexible enough to protect it.

Carrington v. Rash, 380 U.S. 89 (1965), illustrates the same flexibility. There the Court invalidated a Texas constitutional prohibition of voting by servicemen who entered Texas while in service, even though they might be bona fide residents. Here the protected group was even more temporary than the "poor," and certainly neither historically suspect nor traditionally disfavored. But united by its condition–military status–it was entitled to equal protection.

Kramer v. Union Free School District No. 15, supra, continued the process of guaranteeing equal protection of the laws to groups denied the franchise in particular elections for less than compelling state interests or by methods unnecessary to what may or may not have been compelling interests. There the Court invalidated a New York statute which limited participation in school district elections to those who 1) owned or leased taxable real property in the district, 2) were married to one who so owned or leased, or 3) were the parents of or had custody of a child enrolled in a local district school. Pointing out that the petitioner, a bachelor who lived with his parents, was interested in and affected by the outcome of the elections but ineligible to vote in them, as were senior citizens, boarders, clergy, and others, the Court held that this latter group was denied equal protection by the statutory limitation.

Finally, more recently this Court decided two "denial" cases of obvious relevance here. Both cases involved local elections to pass upon revenue bonds, *Cipriano v. Houma, supra* and general obligation bonds, *Phoenix v. Kolodziejski,* 26 L.Ed.2d 523 (1970), from which otherwise qualified voters who were not property-taxpayers were excluded. In both, this Court held the excluded groups were entitled to equal protection, and rejected various asserted

state interests proferred to justify denying a political voice to those groups. *Cipriano* and *Kolodziejski* are extremely important here because they are the first voting rights cases to apply an equal protection analysis to elections where citizens, instead of voting for public officials who will in turn determine public policy, are themselves passing directly upon questions of public policy. Moreover, in those two cases, this Court applied the rigorous Equal Protection standard, invoked to test infringements of the right to vote, and demanded a showing that the exclusion of some voters was necessary to advance compelling state interests.

These cases demonstrate the willingness of this Court to expand the categories of protected groups far beyond those stable classes traditionally the victims of discrimination, into an infinite number of situations involving the selective distribution of the franchise. They also demonstrate that this Court will not tolerate schemes designed to deny the vote completely to certain groups and individuals.

Relevant to this case is another doctrinal development, of more recent origin: the apportionment or one man–one vote cases. Beginning with the historic decision in *Baker v. Carr*, 369 U.S. 186 (1962), this Court has envinced an additional constitutional concern not merely with denial of a political voice to certain classes or citizens, but with *dilution* of that political voice. This second line of decisions was described by the California Supreme Court as follows:

> The second major area in which the high court has intervened involves state geographical districting systems which dilute the effectiveness of the franchise either directly or through the allocation of legislative representation. In order to insure that voting power remains precisely correlated with population, the court has abolished electoral systems which weighted votes in elections for statewide office; it has ordered that the districting of federal congressional seats and the apportionment of both houses of state legislatures be conducted on the

basis of substantial population equality among such units. Subsequent cases have insisted upon a rule of absolute equality of population and have extended the principle of "one man, one vote" to various units of local government. *The result of these decisions has been to equalize the effectiveness of participation in the political process. Westbrook v. Mihaly, supra* at 849. (footnotes omitted) (emphasis added).

Beginning in *Gray v. Sanders,* 372 U.S. 368 (1963), continuing in *Wesberry v. Sanders,* 376 U.S. 1 (1964) and culminating in *Reynolds v. Sims,* 377 U.S. 533 (1964) this Court developed the doctrine that each qualified voter is entitled to an equal voice in the political process. *Reynolds* was a doctrinal watershed where, building upon previous rulings which invalidated attempts to deny the franchise, this Court announced the rule that equal protection safeguarded against not only denial of the vote, but against dilution as well:

> Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections. A consistent line of decisions by this Court in cases involving attempts to deny or restrict the right of suffrage has made this indelibly clear. It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote. . . and to have their votes counted. . . . The right to vote can neither be denied outright . . . nor destroyed by alterntion of ballots . . nor diluted by ballot-box stuffing . . . Racially based gerrymandering. . .and the conducting of white primaries, . . .both of which result in denying to some citizens their right to vote, have been held to be constitutionally impermissible. And history has seen a continuing expansion of the scope of the right of suffrage in this country. The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that

> right strike at the heart of representative government. *And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise. Reynolds v. Sims, supra* at 554-55 (citations and footnotes omitted) (emphasis added).

The Court went on to spell out its concern with apportionment schemes which diluted the weight of a citizen's vote, depending on geographic residency:

> Overweighting and overvaluation of the votes of those living here has the certain effect of dilution and undervaluation of the votes of those living there. The resulting discrimination against those individual voters living in disfavored areas is easily demonstrable mathematically. Their right to vote is simply not the same right to vote as that of those living in a favored part of the State. . . . Weighting the votes of citizens differently, *by any method or means*, merely because of where they happen to reside, hardly seems justifiable.
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> * * *
>
> Full and effective participation by all citizens in state government requires, therefore, that each citizen have *an equally effective voice* in the election of members of his state legislature. Modern and viable state government needs, and the Constitution demands, no less. 377 U.S. at 563-565 (emphasis added).

In numerous cases since then, the Court has utilized this equal voice doctrine, or one man one vote, to require almost absolute equality in population of legislative districts in order to insure that there will be no dilution of the electoral influence of each voter. See, *e.g.*, *Wells v. Rockefeller*, 394 U.S. 542 (1969). More relevantly, the dilution doctrine has also been applied to elections for local governing bodies, legislative or governmental. See, *e.g.*, *Avery v. Midland County*, 390 U.S. 474 (1968); *Hadley v. Junior College District*, 397 U.S. 50 (1970). In *Hadley*, the Court

summarized its prior rulings as establishing the principle that "a qualified voter has a constitutional right to vote in elections without having his vote wrongfully denied, debased or diluted" and that all voters had the right "to have their votes given the same weight as that of other voters." 25 L.Ed.2d at 49. The Court continued:

> This Court has consistently held in a long series of cases, that in situations involving elections, the States are required to insure that each person's vote counts as much, insofar as it is practicable, as any other person's. We have applied this principle in congressional elections, and local elections. The consistent theme of those decisions is that the right to vote in an election is protected by the United States Constitution against dilution or debasement. 25 L.Ed.2d at 49-50 (footnote omitted).

See also, *Kramer v. Union Free School District No. 15, supra* ("Thus, state apportionment statutes, which may *dilute* the effectiveness of some citizens' votes, receive close scrutiny from this Court. . . . No less rigid an examination is applicable to statutes *denying* the franchise to citizens who are otherwise qualified by residence and age." 395 U.S. at 626 [emphasis in original]).

As the Court's review of its precedents makes clear, it has been preoccupied with the equal protection ramifications of both denial and dilution of the right to vote. It has refused to tolerate the exclusion of voters from elections for public officials and, more importantly for this case, from elections where the voters are asked to pass directly upon public questions by approving or disapproving bond issues. And, the Court has also made it clear that it will be as vigilant against schemes which dilute the vote of particular citizens or groups. From these two separate doctrinal strands, a unifying principle emerges: the definition of those who will be entitled to participate in a particular election is subject to rigorous scrutiny to determine whether anyone has been improperly excluded, and once the electorate for any given election is defined in a consti-

tutional manner, each voter is entitled to an equal voice in the outcome.

This case presents the doctrinal watershed for the tying together of these two decisional strands. *Reynolds v. Sims* provided the occasion for this Court, building upon prior cases dealing for the most part with *denial* of the vote, to declare that dilution of a man's vote was equally offensive to the Equal Protection Clause. Here the Court has the similar opportunity, building upon its rulings in *Cipriano* and *Kolodziejski*, which foreclose the argument that equal protection does not apply to elections such as these, and applying the analysis of the reapportionment cases, to hold that the Equal Protection Clause which scrutinizes efforts to deny the vote in municipal bond elections, also interdicts the dilution of each man's vote in such elections, when he is called upon to pass on substantive issues of local government.

II. THE EQUAL PROTECTION ANALYSIS APPLIED HERE.

As indicated in Part I, *supra*, this Court's decisions in voting rights cases follow two main trends, for convenience referred to as denial cases, *e.g.*, *Carrington v. Rash, supra; Kramer v. Union Free School District No. 15, supra*, and dilution cases, *e.g.*, *Reynolds v. Sims, supra*. The Court has already held that the right to vote in local revenue bond or general obligation bond elections cannot be denied to non-property owners. The question here is whether the right to vote can be diluted by the extraordinary majority requirement. That this type of issue can be resolved by application of the principles set forth above has been recognized not only by the court below and by the California Supreme Court, but also by a three-judge federal court in Minnesota. See, *Rimarcik v. Johansen*, 310 F.Supp. 61 (D. Minn. 1970), *appeal filed*, 38 U.S.L.W. 3468 (May 5, 1970) (provision requiring fifty-five percent affirmative vote to adopt home rule charter amendment violates equal protection), *but see, Brenner v. Kansas City School District*, ___

F. Supp.___ (W.D. Mo. 1970), 39 L.W. 2122 (9/8/70), (two-thirds affirmative vote required to approve school tax levy and bond issue held not violative of equal protection).

Most of the courts dealing with extraordinary majority requirements have noted that although the factual bases of this Court's voting rights cases have been different from the pattern here, the principle enunciated in those decisions easily applies in this context.

A. The Classification and its Effect

One argument raised by those defending extraordinary requirements is that statutes such as this do not impose a classification, or if they do, the classification is not a discriminatory one since there is no disadvantaged class of people easily identifiable prior to an election, and each man's vote is fully counted. See, *Lance v. Board of Education of Roane County, supra* at 800 (dissenting opinion); *Westbrook v. Mihaly, supra;* see also, Comment, *Extraordinary Majority Voting Requirements,* 58 Geo.L.J. 411, 412 (1969). *Amici* submit, however, that schemes which impose extraordinary majority requirements do classify and discriminate against those who vote in favor of local financial measures, and do so without advancing any compelling state interest which might justify that discrimination See *Kramer v. Union Free School District No. 15, supra; Cipriano v. Houma, supra; Phoenix v. Kolodziejski, supra.*

That the constitutional and statutory arrangement below does classify voters into two distinct groups is persuasively demonstrated by the California Supreme Court:

> It appears obvious to us that section 18 implicitly creates two classes of voters: those who favor a proposed bond issue and those who oppose it. It is not essential that a classification appear in explicit terms on the face of the law. Nor is it necessary that those who are allegedly disadvantaged by the classification either constitute a class which is "objectively identifiable" prior to the election or that they share in common other characteristics, such as

> race, economic status or residence. It is sufficient that the class emerge from its inchoate state at the time of the election and that it be defined by the act of voting affirmatively on a bond issue proposition. The equal protection clause extends to the shared political interests of groups otherwise random and diverse. *Westbrook v. Mihaly, supra* at 850.

Indeed, in *Williams v. Rhodes*, 393 U.S. 23 (1968) and *Hunter v. Erickson, supra*, this Court applied an equal protection standard to vindicate the interests of citizens who did not constitute a readily identifiable class prior to the elections in question. A statute which required that sixty percent of those voting in an election for a Governor or state legislator must vote for the challenger in order for an incumbent to be defeated (arrangements which would presumably be based on rationales similar to the ones offered here) would certainly be found to effect a classification among voters.

Assuming then that these arrangements do classify the voters into two groups, does the classification have a discriminatory impact? It is no answer to contend that each voter casts a vote formally equal to every other voter. That is certainly true in a formalistic sense. But it was also true in the reapportionment cases. Each voter cast only one vote for a legislative candidate. But taken in the aggregate, the votes of certain classes of voters had a greater impact than the votes of other classes. That was the very essence of the discrimination. In *Reynolds v. Sims, supra*, this Court compared the total effect of malapportionment to an overt arrangement which accomplished the same ends:

> And, if a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted. It would appear extraordinary to suggest that a State could be constitutionally per-

> mitted to enact a law providing that certain of the State's voters could vote two, five or 10 times for their legislative representatives, while voters living elsewhere could vote only once. And it is inconceivable that a state law to the effect that, in counting votes for legislators, the votes of citizens in one part of the State would be multiplied by two, five, or 10, while the votes of persons in another area would be counted only at face value, could be constitutionally sustainable. 377 U.S. at 562. See also, *Gray v. Sanders, supra* at 379-380.

And yet this is precisely the effect of extraordinary majority arrangements. Although maintained through the mechanism of requiring a fifty-five or sixty percent or two-thirds affirmative vote, their effect is precisely the same as a procedure wherein although a simple majority would prevail, each negative vote were weighted one-and-one-half times each affirmative vote. It cannot be maintained that there is no dilution of the vote of those who cast an affirmative ballot. Dilution of a citizen's vote because of the way he votes is no more tolerable than dilution of his vote because of the area in which he votes. See *Carrington v. Rash, supra* at 94. The California Supreme Court had little difficulty recognizing the weighting effect of a two-thirds requirement:

> It does not require extended discussion to establish that the inevitable result of any extraordinary majority requirement is to give to one group of voters a greater influence on the outcome of an election than to another group of comparable size but opposite conviction. This is the functional equivalent of according to each person in the former group a vote of relatively greater weight precisely because of his position on the issue which is to be decided. In other words, a result identical to that produced by a two-thirds vote requirement could be achieved by requiring only a 50 percent affirmative vote for passage of bond issue propositions but providing that in tabulating the election results each negative vote would be multiplied by two while af-

> firmative votes would be counted at face value. Alternatively, those citizens who opposed a measure could be permitted to vote twice while those who favored it were limited to only one ballot. The biased structure of both of these voting schemes is perhaps more obvious than the discrimination inherent in an extraordinary majority vote requirement. The effect of each, of course, is identical. "If a State in a statewide election weighted the male vote more heavily than the female vote or the white vote more heavily than the Negro vote, none could successfully contend that the discrimination was allowable. [Citation]" (Gray v. Sanders, supra, 372 U.S. 368, 379, 83 S.Ct. 801,808.) Although the question of whether such discrimination is allowable has not been settled by the Fifteenth or the Nineteenth Amendment, we think it equally apparent that when a state weights the negative vote more heavily than the affirmative vote, no one can successfully contend that there is *no* discrimination. *Westbrook v. Mihaly, supra* at 851 (footnotes omitted).

And the three-judge court in *Rimarcik v. Johansen, supra,* correctly observed that the method by which the principle of one man, one vote is infringed may vary:

> The right protected in the one man, one vote cases is a person's right to have his vote be given equal weight to that of other voters. Whether the state denies this right by malapportioned districts or by some other means is not the controlling factor in determining whether the state has acted constitutionally. We believe the test is not the means by which the state has exercised its power to deny a person within its jurisdiction the equal protection of the laws, but whether the power has in fact been exercised. 310 F.Supp. at 67.

Again, if it took more than a simple majority to defeat an incumbent office-holder, could it seriously be maintained that those who voted for the challenger had not had their votes diluted and those who supported the incumbent not had their votes weighted.

B. Standard of Review

Once confronted with a discriminatory classification, the next task is to determine which standard of review should obtain in deciding whether the challenged discrimination nevertheless is tolerable. It is apparent that this aspect of any equal protection analysis can be crucial: discriminatory arrangements which have a rational relationship to a conceivable legitimate state purpose might not be found to be necessary to a compelling state interest. *Compare, McDonald v. Board of Election Commissioners of Chicago,* 394 U.S. 802 (1969) *with Kramer v. Union Free School District No. 15, supra.*

This Court has consistently indicated that statutes which deny or impair the right to vote are subject to careful scrutiny since the right to vote, either for elected officials, or in bond elections, is a fundamental constitutional interest. See, *e.g., Reynolds v. Sims. supra; Cipriano v. Houma, supra; cf. Dandridge v. Williams,* 25 L.Ed.2d 491 (1970). Accordingly, most of the courts which have considered the question have found that the right to vote on an equal footing in elections such as this comes within the purview of fundamental constitutional interests and can therefore be diluted only if compelling state interests are necessarily advanced by such dilution. See, *Lance v. Board of Education of Roane County, supra; Westbrook v. Mihaly, supra* at 852-54; *Rimarcik v. Johansen, supra* at 65.* As the court below pointed out,

> Certainly the right of the voter to equal protection, the right to protection against the dilution or debasement of the weight or force of an individual's vote, is fully as sound, sacred and important when he is voting on issues involving taxation, public reve-

*The three-judge court in *Brenner v. Kansas City School District, supra,* held that a two-thirds requirement for passing upon local bonds and tax levies passed constitutional muster under either the permissive or strict equal protection test.

> nue and the promotion of an adequate public school system, as when he is voting for the nomination or election of a constable, a state senator, a governor or any other public official to represent the voter in government. 170 S.E.2d at 790-91.

It is not surprising that the right to vote in such local elections would have been characterized as a fundamental interest invoking the strict equal protection standard. Such a rigorous standard is applied to efforts to infringe the right to vote for elected officials who will in turn determine the content of public policy. Where the voters themselves are called upon to pass directly upon such public issues, it would seem, *a fortiori*, that their right to vote is similarly a fundamental interest. In this type of election, the right to vote is in its most pristine form. Indeed, this Court has already implicitly resolved the question of how to categorize the voting right at stake here by applying the strict standard to schemes which denied certain classes of citizens the right to vote in local referendum elections on issues of public finance. See *Cipriano v. Houma, supra; Phoenix v. Kolodziejski, supra.* Unless there is some constitutional distinction between denying the vote in such elections and diluting it, a distinction which all the reapportionment cases would appear to refute, then the discrimination imposed here must be measured against the "compelling interest" standard, not the "reasonable relation" yardstick. As this Court stated in *Kolodziejski,*

> Presumptively, when all citizens are affected in important ways by a governmental decision subject to a referendum, the Constitution does not permit weighted voting or the exclusion of otherwise qualified citizens from the franchise. 26L.Ed.2d at 527.

Therefore, the burden of demonstrating that the "weighted voting" provisions necessarily advance compelling state interests is on the proponents of extraordinary majority devices.

C. The Compelling Interest Analysis

The main justification offered for giving a minority of the community the power to veto additional public expenditures is that such arrangements promote "fiscal responsibility" and provide against unwise indebtedness. The California Supreme Court has persuasively demonstrated that the stability of local general obligation bonds is completely unrelated to whether an extraordinary majority requirement is imposed as a precondition to their issuance. It has detailed the history of such requirements in local financing, the sophistication of public officials and procedures and private investors, and the alternative means of financing which are occasionally available. It has demonstrated that a decision to approve a bond issue and undertake a governmental project is not significantly different from other public policy questions so as to justify requiring more than a simple majority to approve them. The analysis is contained in the *Westbrook* opinion at 87 Cal Rptr. 855-863, and *amici* respectfully refer the Court to it. There has been no demonstration in this case that the situation in West Virginia is not amenable to the same analysis.

We would provide some additional observations. First, to the extent that the sixty-per cent requirement is intended to advance the interests of property owners who, arguably, might ultimately be called upon to make good on local obligations, this Court has already ruled such interests inadequate to sustain a denial of equal protection in the distribution of the vote. In *Phoenix v. Kolodziejski*, where the issue was denial of the vote to non-property owners in a bond election, this Court stated:

> Third, the justification for restricting the franchise to the property owners would seem to be strongest in the case of a municipality which, unlike Phoenix, looks only to property tax revenues for servicing general obligation bonds. But even in such a case the justification would be insufficient. 26 L Ed 2d at 528.

Second, West Virginia law contains various provisions to control local debt and tax levies. For example, Article 10, section 1 of the Constitution provides specific limits, based on a proportion of valuation, on the tax which can be imposed on different categories of property. Local taxes can be increased, but only for a period of three years and not more than 50% of the specified maximum rate. (Section 20 allows additional tax levies by school districts for up to 5 years and 100%.). Article 10, section 8 provides that no political entity may become indebted for more than 5 percent of the value of its taxable property. These provisions serve to protect local financial stability and thus reduce the need for the extraordinary majority requirements.

With regard to such problems as voting irregularities or improper use of public facilities to support one side of the issue, one would assume that the state could find less drastic means of dealing with these problems than diluting the right to vote of a majority of the community. In addition, if, as has been argued, decisions on tax and bond issues are so complicated so as to require some kind of "governor" on the majority, then the solution is to withhold the vote completely, not to grant it in a discriminatory manner.

Finally, much has been said about whether the Equal Protection Clause requires "majority rule" in all our governmental institutions. Proponents of the type of weighted voting at issue here have pointed to numerous other provisions in the Federal and state constitutions which depart from a majoritarian principle. But most of the provisions deal either with the management of internal legislative affairs, the distribution of power between branches of government, or the procedures for organic changes in the instrumentalities of government, while the historic weight of precedents which bear on the issues here involve denials or infringements of the right to vote for officials or on public issues. Whether any of those provisions could withstand the scrutiny of the analysis set forth above does not have to be determined here. What does have to be decided is whether the dilution of the voice of a majority of the com-

munity in elections such as these is necessary to advance specific compelling state interests. In resolving that question, this Court should recall its observation in *Reynolds v. Sims, supra:*

> Logically, in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State's legislators. To conclude differently, and to sanction minority control of state legislative bodies, would appear to deny majority rights in a way that far surpasses any possible denial of minority rights that might otherwise be thought to result.
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> * * *
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> And the democratic ideals of equality and majority rule, which have served this Nation so well in the past, are hardly of any less significance for the present and the future. 377 U.S. at 565-66.

We submit that those ideals are no less applicable here.

III. *HUNTER V. ERICKSON*: AN ALTERNATIVE THEORY

In the previous discussion, *amici* have contended that the decision below can be upheld within the framework of this Court's voting rights cases and their principle that the right to vote can neither be denied nor diluted unless such discrimination is necessary to advance compelling state interests. We think that there is an alternative theory available here, involving a slightly different perspective on this Court's decisions, and premised on the concept enunciated in *Hunter v. Erickson*, 393 U.S. 385 (1969) that arrangements which "disadvantage" the law-making interests of certain groups are constitutionally suspect.

A. *Hunter v. Erickson:* The Sophistication of Means, and This Court's Response

The decisions of this Court protecting the franchise under the Equal Protection Clause have invalidated schemes of discrimination that were, for the most part, simple and obvious. It is unimaginative, if straightforward, simply to refuse to register Negroes. *Nixon v. Herndon, supra.* It is only a little more complicated to exclude blacks from the political process by means of all-white primary elections. *Terry v. Adams, Smith v. Allwright, Nixon v. Condon, supra.* Nor is it very subtle to redraw boundary lines to exclude the black vote. *Gomillion v. Lightfoot, supra.* Thus the most traditional function of the Equal Protection Clause in securing the franchise—guaranteeing the vote to traditionally disfavored groups such as blacks—has been fulfilled in a relatively obvious fashion.

But there are many ways to discriminate against, for example, the black vote, of which outright denial, exclusion from primaries, or exclusion from districts are only the most crude examples. There are many more sophisticated schemes.* For example, distinctions can be drawn that are seemingly unrelated to identifiable voters, but related instead to the issues in which those voters are interested.

Thus in *Hunter v. Erickson,* 393 U.S. 385 (1969), the Court was confronted with a new and very different scheme of discrimination. The City of Akron, Ohio, had by majority vote amended its charter to attack *not Negroes, but the interests of Negroes.* The amendment provided that before any ordinance regulating the sale, lease or sublease of real property on the basis of race, color, religion, national origin or ancestry could become effective, it must be approved by a majority vote at a regular or general election.

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*One such arrangement, the use of at-large election districts to deny political power to minority groups, is currently under scrutiny by this Court in Whitcomb v. Chavis, No. 52, O.T. 1970; Ruckelshaus v. Chavis, No. 53, O.T. 1970.

Thus the questioned provision isolated fair housing ordinances, a common interest of the disfavored class, and made the realization of that interest in the law a special and more difficult requirement.

In an eight-to-one decision this Court held the charter provision invalid as a denial to Akron's Negros of the equal protection of the law. Noting that other ordinances–even other housing ordinances, such as those concerned with age or sex or tenants with pets–were not subjected to the extra hurdle of the charter provision, Mr. Justice White, writing for the Court, concluded that the provision "made it substantially more difficult to secure enactment" of fair housing ordinances, 393 U.S. at 390, than other ordinances. The precise nature of the impermissible distinction bears close reading:

> Section 137 thus drew a distinction between those groups who sought the law's protection against racial, religious, or ancestral discriminations in the sale and rental of real estate and those who sought to regulate real property transactions in the pursuit of other ends. Those who sought, or would benefit from, most ordinances regulating the real property market remained subject to the general rule . . . 393 U.S. at 390.

This extra burden placed in the way of the lawmaking interest of Negroes constituted, in the Court's view, another method of disadvantaging a disfavored group:

> . . .the State *may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf* than it may dilute any person's vote or give any group a smaller representation than another of comparable size. Cf. Reynolds v. Sims . . . Avery v. Midland County. . . 393 U.S. at 393 (emphasis added).

Thus the Court fulfilled its promise, made in the context of equal protection in *Reynolds v. Sims, supra* at 563, that "the Constitution forbids 'sophisticated as well as simple-minded modes of discrimination.' "

B. The Sixty Percent Vote Requirement Violates the Equal Protection Clause Because it "Disadvantage[s] a Particular Group by Making it More Difficult to Enact Legislation in its Behalf."

It was earlier suggested that two closely parallel lines of cases form the basis for securing the franchise under the Equal Protection Clause. The first, including *Condon*, *Herndon*, *Allwright*, *Gomillion*, and *Terry*, protect the traditionally disfavored groups, such as blacks, from direct, simple invasions of their right to vote. The second, including *Harper*, *Carrington*, *Reynolds*, *Gray*, *Kramer*, *Cipriano*, and *Kolodziejski* protect against the same invasions those classes that are neither historically obvious nor permanently fixed, but are established by such shifting factors as poverty (*Harper*), military status (*Carrington*), geography (the reapportionment cases), and by specific statutory exclusions such as non-owners, non-renters, and non-parents (*Kramer*) or non-property taxpayers (*Cipriano*, *Kolodziejski*).

Hunter v. Erickson properly belongs at the end of the first line of cases, protecting as it does the most traditionally disfavored group, but from a quite novel form of discrimination in the law-making process. The cases presently before this Court are, for the second line of cases, the exact parallel of *Hunter*.

Here a broad, shifting group—those dependent on local government's bonded indebtedness and tax revenues—have had their interest identified in the West Virginia Constitution and statutes and a special obstacle, the sixty-percent requirement, places in the way of its realization in the law-making process. Similar law-making interests, even those involving long term local indebtedness and local financing, can be pursued by less onerous means. Thus the logic of *Hunter* is squarely in point.

As indicated above, the only significant effect of a sixty-percent requirement is that it prevents passage of numerous bond issues and revenue financing measures desired by a majority of the voters in a community; such a requirement

is not necessary to advance the goals of fiscal stability, since other mechanisms have developed to safeguard those goals. Yet the provisions in question isolate only certain types of municipal spending. Other kinds of long-term indebtedness can be incurred without having to be subjected to the sixty-percent requirement. In West Virginia, revenue bonds are apparently not within the meaning of the general obligation bond provisions, see *State ex rel County Court of Marion County v. Demus*, 135 S.E.2d 352 (Sup. Ct. of App. 1964), and thus utility projects can be financed without clearing the sixty-percent hurdle.

But those who desire civic improvements such as schools, parks and other public improvements are subject to the historical suspicion of "municipal extravagance." Whether parents with school children, teachers, or simply citizens concerned about the quality of education or recreation, they are bound together by the common element that they depend, for the realization of their interest, on the credit and finances of the local community. The constitutional and statutory arrangements here isolate their interests and place the extraordinary majority requirement in the way of their enactment into law. This is the essence of the technique–extra obstacles to the legislative interests of a given group–condemned in *Hunter*. It is no more tolerable here than it was in *Hunter*.

CONCLUSION

For the reasons set forth herein the judgment of the court below should be affirmed.

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